

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1151543-D3  
AND ALL OTHER SEAMAN'S DOCUMENTS

Issued to: Manuel BATISTA

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

1965

Manuel BATISTA

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 3 May 1972, an Administrative Law Judge of the United States Coast Guard at New York, New York suspended Appellant's seaman's documents for three months outright plus six months on 18 months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as an Ordinary Seaman on board the SS MORMACARCO under authority of the document above captioned, Appellant:

(1) did, on 23 July 1971, while said vessel was at sea, wrongfully assault and batter with a dangerous weapon, to wit, a knife, a member of the crew, Kenneth Smith;

(2) did, on 23 July 1971, wrongfully verbally threaten a fellow crew member, Mr. Smith, with death; and

(3) did, on 31 July 1971, while said vessel was at sea, wrongfully fail to perform his assigned duties due to intoxication.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the testimony of Bos'n Kenneth A. Smith, excerpts from the shipping articles and officials ship's log and a sketch of the Bos'n's Room.

In defense, Appellant offered in evidence the testimony of Appellant, excerpts from the official ship's log and medical log and the deposition of Wilton Thompsett.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and three specifications had been proved. The Administrative Law

Judge then entered an order suspending all documents, issued to Appellant, for a period of three months outright plus six months on 18 months' probation.

The entire decision was served on 10 May 1972. Appeal was timely filed on 15 May 1972.

#### FINDINGS OF FACT

On 23 July 1971 and 31 July 1971, Appellant was serving as an Ordinary Seaman on board the SS MORMACARGO and acting under authority of his document while the ship was at sea.

On the morning of 23 July 1971 Appellant entered the room of Bos'n Kenneth A. Smith, awakened Smith and said, "Bos'n, I am going to kill you." Appellant held a knife in his hand. Smith sat up and, when the opportunity presented itself, pushed Appellant causing him to fall. Smith then attempted to get the knife, but Appellant had closed it and placed it in his pocket. At no time did Appellant strike or attempt to strike with the knife.

Later the same day Appellant stated to Smith, "I will kill you."

On 31 July 1971 Appellant was intoxicated and failed to stand his watch.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the findings of fact do not support the Administrative Law Judge's finding that the First Specification of assault and battery with a dangerous weapon was proven and charged in that the Appellant did not attack the victim, nor did he attempt to attack him.

APPEARANCE: Appellant, by Abraham Freedman, Esq.

#### OPINION

Appellant's point on appeal pertaining to proof of battery is well taken. The record is devoid of any evidence to support the finding of the Administrative Law Judge that Appellant committed battery with a dangerous weapon on the day of 23 July 1971. A battery requires an unauthorized touching of one by another. Here there was a specific finding that Appellant did not cut Smith with the knife and the record presents no evidence of any other action on Appellant's part which would substantiate a finding of battery with a dangerous weapon.

The portion of the Appeal which goes to assault is not well taken. Appellant is correct that the record does not support a finding of an attempted battery; there was no action by him which could in any way be said to have been an attempt to carry out his threat against Smith. However, action on the part of the perpetrator which creates a reasonable apprehension for personal safety on the part of the victim also constitutes assault for the purpose of a misconduct charge. This type of assault requires apparent ability on the part of the perpetrator to carry out his threatened action. In the instant case Appellant had the apparent ability to carry out his threat, and reasonable apprehension on the part of Smith can be inferred in view of the nature of the confrontation. Therefore, there is substantial evidence on the record to support the finding that Appellant was guilty of assault with a dangerous weapon.

#### CONCLUSION

The findings of the Administrative Law Judge are amended to conform to the above opinion finding Appellant guilty of assault with a dangerous weapon. In view of the other specifications found proved and not appealed, Appellant's prior record, and the seriousness of a charge of assault with a dangerous weapon, no change in the order of the Administrative Law Judge is warranted.

#### ORDER

The order of the Administrative Law Judge dated at New York, New York on 3 May 1972, is AFFIRMED.

T.R. SARGENT  
Vice Admiral, U.S. Coast Guard  
Acting Commandant

Signed at Washington, D.C., this 29th day of June 1973.

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